UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Ronald PAGAN,	:
Petitioner,	:
	:
v.	: No. 3:97cr204 (PCD)
	: No. 3:02cv453 (PCD)
UNITED STATES of AMERICA,	:
Respondent.	:

RULING ON PETITIONER'S MOTION FOR CERTIFICATE OF APPEALABILITY AND MOTION FOR APPOINTMENT OF COUNSEL

Petitioner moves for a certificate of appealability from the rulings denying his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and his motion to amend. For the reasons stated herein, Petitioner's motion is **denied**.

I. Background [1]

On April 16, 2003, this Court denied Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Doc. No. 382]. In that motion, Petitioner had raised three claims: 1) he was denied effective assistance of trial counsel by his counsel's failure to challenge the constitutionality of the VCAR statute before this Court; 2) the VCAR statute is unconstitutional; and 3) this Court lacked subject matter jurisdiction over the case because "the legislative premise upon which federal jurisdiction of VCAR is founded is flawed." On July 2, 2003, this Court denied as time-barred Petitioner's petition to amend, in which Petitioner alleged a fourth ground, that the sentencing court lacked the authority to depart upwards from the Sentencing Guidelines [Doc. No. 392].

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[1] The Court presumes familiarity with all previous rulings and the background of this case.

II. Discussion

A. Standard for Issuing Certificate of Appealability

A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *United States v. Perez*, 129 F.3d 255, 259-60 (2d Cir.1997). "The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by" § 2253(c)(2). 28 U.S.C. § 2253(c)(3). When a petitioner raises a claim that was decided on the merits, in order for a certificate of appealability to issue he "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id*. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id*.

B. Petitioner's Claims

Petitioner argues that the following three issues are subject to debate among reasonable jurists: (1) the Court's determination that Petitioner received effective assistance of counsel; (2) the Court's determination that his motion to amend was a second or successive petition under § 2255; and (3) the Court's determination that *Apprendi* is not to be applied retroactively.

1. Ineffective Assistance of Counsel Claim

Petitioner apparently argues that trial counsel's failure to calculate his sentence correctly pursuant to the Sentencing Guidelines constitutes ineffective assistance of counsel. However, in his initial § 2255 motion his ineffective assistance of counsel claim was based on counsel's failure to challenge the constitutionality of the VCAR statute at trial. His purported fourth ground raised in his motion to amend alleged that the trial court (not counsel) erred in applying the Sentencing Guidelines. In his memorandum in support of his motion to amend, he alleged that trial counsel was ineffective for failure to object to an improper sentence.

To any extent Petitioner seeks a certificate of appealability on his ineffective assistance of counsel claim based on counsel's alleged failure to challenge the constitutionality of VCAR, this claim was considered on its merits and it was found that "in light of legal precedent such challenge most likely would have failed." Ruling on Mot. to Vac. Sent. at 6 [Doc. No. 382]. Accordingly, jurists of reason would not find the Court's assessment debatable. The failure to raise a meritless argument does not constitute ineffective assistance of counsel. *United States v. Kirsch*, 54 F.3d 1062, 1071

(2d Cir. 1995). A certificate of appealability will not issue because Petitioner has not made a substantial showing of denial of a constitutional right on this issue.

To any extent Petitioner alleges ineffective assistance of counsel for failure to object to his alleged improper sentence, his claim fails. His claims regarding sentencing were not raised in his initial § 2255 motion, but were raised in his motion to alter or amend judgment. In that motion, Petitioner alleged that "[o]n or about March 6, 2002, [he] submitted two motions pursuant to 28 U.S.C. § 2255." His first motion, Doc. No. 369, contained three grounds which were the subject of this Court's Ruling on his Motion to Vacate, Set Aside, or Correct Sentence [Doc. No. 382]. Petitioner alleges that after conversing with a prison law clerk, he filed a second/amended petition "on March 20, 2002." Pet. Mot. to Alter or Amend J. at 2 & n*.

This Court declined to credit Petitioner's allegation that he filed the amended petition with the fourth ground on March 20, 2002. The Court's docket, which indicated that the motion containing three grounds was docketed on March 13, 2002, did not reflect any subsequent motions received in March 2002. Nor did the Government's records reflect any such second motion filed at that time. The Court also noted the Government's observation that "[s]ignificantly, in the reply [Petitioner] filed to the Government's response to his petition, he mentioned nothing about a purported "fourth ground" that was unaddressed by the Government." Gov'ts Mot. To Transfer at 1. The Court rejected Petitioner's "self-serving allegation" that he sent his petition including the fourth ground on March 20, 2002, instead deeming it filed on November 14, 2002, when he filed his

"Traverse to Government's Answer to Petitioner's Motion Under 28 U.S.C. § 2255." Ruling on Pet. Mot. to Alter or Amend J. and Resp. Mot. to Transfer at 7 [Doc. No. 392].

The fourth ground raised in Petitioner's motion to amend alleged that the Sentencing Court did not have the authority to depart upwards from the Sentencing Guidelines. His supporting memorandum alleged that his trial counsel was ineffective for failing to object to this sentence. The Court denied his motion to amend on procedural grounds, finding that the fourth ground (which relates to sentencing issues) did not relate back to the timely filed motion because none of the facts alleged in Petitioner's initial motion pertain to whether the Court had the authority to depart from the Sentencing Guidelines. Because his claims about sentencing issues did not relate back to his timely filed § 2255 motion, it was found that it would be futile to grant his motion to amend because his claim would be time barred.[2]

Here, AEDPA's time bar is clearly established and is not subject to debate among reasonable jurists. The United States Supreme Court denied Petitioner's petition for writ of certiorari on March 26, 2001. *Pagan v. United States*, 532 U.S. 943, 121 S. Ct. 1405,

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[2] In its ruling, this Court noted that

> in his initial § 2255 motion filed on March 13, 2002 [Doc. No. 369], Petitioner raised the following claims: 1) he was denied effective assistance of trial counsel by his counsel's failure to challenge the constitutionality of the VCAR statute before this Court; 2) the VCAR statute is unconstitutional; and 3) this Court lacked subject matter jurisdiction over the case because "the legislative premise upon which federal jurisdiction of VCAR is founded is flawed." In contrast, the fourth ground raised in his motion to amend deemed filed on November 14, 2002, alleges that the "sentencing court did not have authority to depart upward from sentencing guideline leve[l] under § 2E1.3."

Ruling on Pet. Mot. to Alter or Amend J. and Resp. Mot. to Transfer at 6-7 [Doc. No. 392]. The Court found that while Petitioner's first three claims hinged on his challenges of VCAR and its constitutionality, the purported fourth ground was based on application of the Sentencing Guidelines, and therefore the fourth ground did not "relate back" to the timely filed petition. *Id.* at 7.

149 L. Ed. 2d 348 (2001). Accordingly, any habeas petition filed after March 26, 2002 would be time barred. Petitioner's motion to amend was deemed filed on November 14, 2002. It is not subject to debate among reasonable jurists that claims regarding VCAR and claims regarding sentencing are independent, unrelated claims, and that November 14, 2002 is later than March 26, 2002.[3, 4]

Accordingly, Petitioner asserts no proper basis to grant a certificate of appealability on this issue.

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[3] On its merits, Petitioner's claim about the Sentencing Guidelines would fail. On appeal, one of Petitioner's co-defendants had argued that

> Section 1959(a)(1), by its plain language, provides the option that one convicted of VCAR murder may be punished by a fine only. He contends that the district court's statement that "I must impose a sentence of life imprisonment upon you" shows that the district court overlooked this option and mistakenly thought that Section 1959(a)(1) provided a term of life imprisonment as a mandatory minimum.

United States v. Feliciano, 223 F.3d 102, 124 (2d Cir. 2000). The Second Circuit rejected the co-defendant's argument that "the district court's statement that 'I must impose a sentence of life imprisonment upon you' shows that the district court overlooked this option and mistakenly thought that Section 1959(a)(1) provided a term of life imprisonment as a mandatory minimum." *Id.* In rejecting this argument, the court stated

> At the sentencing of each defendant, the district court explicitly rejected the possibility of a fine on the ground that no defendant had assets from which a fine of a magnitude appropriate to the offense could be paid. There was, therefore, no realistic possibility of a fine as a satisfactory possibility for punishing the defendants for the brutal, execution-style murder of a 16-year old boy. Given this finding, it was reasonable for the district court to conclude that it had no realistic choice but to sentence the defendants to life imprisonment.

Id. at 124-25. Therefore, Petitioner would be unable to establish any actual prejudice flowing from counsel's alleged failure to thoroughly understand the Sentencing Guidelines, as he would nonetheless have been sentenced to life imprisonment based on his conviction for the VCAR murder.

[4] Petitioner's Sentencing Guidelines claim is doomed for other reasons, as it has been found that misapplication of Sentencing Guidelines does not warrant granting a certificate of appealability because it does not raise a constitutional issue. *Narducci v. United States,* No. 3:99 CR 248 (CFD) and No. 3:01 CV 1945 (CFD), 2003 U.S. Dist. LEXIS 10614, at *11 (D. Conn. June 23, 2003) (citing 28 U.S.C. § 2253(c)(2); *United States v. Walters*, 47 Fed. Appx. 100, 2002 WL 31059155 , at *2 (3d Cir. Sept 17. 2002) (unpublished opinion) (petitioner's claim that sentencing court misapplied Sentencing Guidelines did not present a constitutional issue sufficient for grant of certificate of appealability); *United States v. Cepero*, 224 F.3d 256, 267-68 (3d Cir. 2000) (same)); *see also United States v. Davis*, 3:98 CR 238 (CFD), No. 3:01CV1294(CFD), 2003 U.S. Dist. LEXIS 7734, at *13-*14 (D. Conn. May 8, 2003).

2. Petitioner's Motion to Amend

Petitioner argues that this Court's determination that his motion to amend [Doc. No. 385] was a second or successive petition under § 2255 is subject to debate among reasonable jurists. However, as the Government points out, Petitioner is incorrect, and the Court did not determine that his motion to amend was a second or successive petition. In its Ruling, the Court construed Petitioner's filing as a motion to amend and denied the Government's motion to transfer (which was premised on the Government's argument that it was a second or successive motion) [Doc. No. 392].

Petitioner cites *Littlejohn v. Artuz,* 271 F.3d 360 (2d Cir. 2001) to support his proposition, but this case clearly supports this Court's Ruling. In *Littlejohn*, the court held that "motions to amend a habeas petition should not be construed as second or successive petitions." *Littlejohn*, 271 F.3d at 362. "[W]hen amendment of a [habeas] petition is sought before the district court rules on the merits of the petition, the motion to amend is not a second or successive petition." *Id*. at 363. Here, Petitioner's motion was properly construed as a motion to amend rather than a second or successive petition. *See* Ruling on Pet. Mot. to Alter or Amend J. and Resp. Mot. to Transfer at 3 [Doc. No. 392] (liberally construing Petitioner's second motion as filed on November 14, 2002, which was before the Court ruled on his initial § 2255 motion). Contrary to Petitioner's suggestion, *Littlejohn* does not stand for the proposition that every motion to amend must

be granted. *See Littlejohn*, 271 F.3d at 364 (contemplating that the district court might deny the petitioner's motion to amend).[5]

Accordingly, Petitioner asserts no proper basis to grant a certificate of appealability on this issue.

3. Petitioner's *Apprendi* Claim

Petitioner attempts to assert an *Apprendi* claim, arguing that "the lower Court in denying Petitioner collateral relief found that since [*Apprendi*] cannot presently be applied retroactively to cases on collateral review, the Court was precluded from considering the claims of wrongful detention." He alleges that he "is serving a conviction and sentence for an 'aggravated crime' (more serious crime) not charged in the indictment or proven beyond a reasonable doubt." However, nowhere in its Rulings did the Court mention *Apprendi*, *see* Doc. No. 382 and 392, as Petitioner did not raise an *Apprendi* claim in his § 2255 motion. Even if he did raise an *Apprendi* claim, it is not subject to debate among reasonable jurists that *Apprendi* is not a watershed rule to be applied retroactively. *Coleman v. United States*, 329 F.3d 77, 90 (2d Cir. 2003) ("*Apprendi* announced a rule that is both 'new' and 'procedural,' but . . . does not apply retroactively to initial [§] 2255 motions for habeas relief").[6]

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[5] Petitioner's reliance on *Zarvela v. Artuz*, 254 F.3d 374 (2d Cir. 2001) also fails to support his proposition. *Zarvela* instructs that "a habeas petitioner, like any civil litigant, is entitled to amend his petition . . . and an amendment will 'relate back' to the date of his original petition if the added claim 'arose out of the conduct, transaction, or occurrence set forth' originally. *Zarvela*, 254 F.3d at 382 (quoting Fed. R. Civ. P. 15(c)(2)). As noted above, it is not subject to debate among reasonable jurists that Petitioner's claims about sentencing issues do not relate back to his claims about VCAR issues.

[6] In support of his *Apprendi* argument, Petitioner alleges that he "is serving a conviction and sentence for an 'aggravated crime' . . . not charged in the indictment or proven beyond a reasonable doubt." The Government responds that he "is serving a sentence for, among other

Moreover, assuming *arguendo* that Petitioner had properly raised an *Apprendi* claim it would fail on the merits. *Apprendi* clearly instructs that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). "The constitutional rule of *Apprendi* does not apply where the sentence imposed is not greater than the prescribed statutory maximum for the offense of conviction." *United States v. Thomas*, 274 F.3d 655, 664 (2d Cir. 2001); *see also United States v. Garcia*, 240 F.3d 180, 184 (2d Cir. 2001) ("[A] guideline factor, unrelated to a sentence above a statutory maximum or to a mandatory statutory minimum, may be determined by a sentencing judge and need not be submitted to a jury"); *see also Harris v. United States*, 536 U.S. 545, 558, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) ("Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments").

Petitioner was sentenced to a life sentence, for (among other charges) a VCAR murder which carried a statutory maximum of life imprisonment. The facts establishing his guilt for the VCAR murder were found by the jury to be proven beyond a reasonable doubt. The penalty for Petitioner's crime cannot be found to have been increased because of some fact not proven to the jury.

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things, [a] VCAR [murder which] carries a statutory maximum . . . of life imprisonment." The jury found that Petitioner was guilty of this murder beyond a reasonable doubt, and, as discussed elsewhere in this Ruling, the Second Circuit found that the trial court did not err in imposing a life sentence for the VCAR murder.

Petitioner has not made a substantial showing of denial of a constitutional right on his *Apprendi* claim.

III. CONCLUSION

For the reasons stated herein, Petitioner has failed to make a substantial showing of the denial of a constitutional right and his motion for a certificate of appealability [Doc. No. 398] is **denied**. As Petitioner has no other claims before this Court, his motion for appointment of counsel [Doc. No. 398] is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, December __, 2003.

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Peter C. Dorsey
Senior United States District Judge